

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs April 29, 2008

**STATE OF TENNESSEE v. FREDERICK JAMES DEMAY**

**Direct Appeal from the Criminal Court for Sullivan County  
No. S53,336 Robert H. Montgomery, Judge**

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**No. E2007-02380-CCA-R3-CD - Filed July 21, 2008**

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The defendant, Frederick James DeMay, pled guilty to one count of especially aggravated sexual exploitation of a minor, a Class B felony, and four counts of statutory rape, a Class E felony. He was sentenced as a Range I, standard offender to ten years in the Department of Correction for the especially aggravated sexual exploitation of a minor conviction and to concurrent terms of two years for each statutory rape conviction, to be served consecutively to the ten-year sentence. The trial court suspended the two-year sentences and placed the defendant on probation for six years. On appeal, the defendant argues that the trial court erred in denying him full probation and in applying one sentencing enhancement factor. We affirm the defendant's convictions and sentences but remand the case to the trial court for entry of corrected judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed and  
Case Remanded for Entry of Corrected Judgments**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Deborah B. Lonon, Assistant Public Defender, for the appellant, Frederick James DeMay.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

At the defendant's guilty plea hearing, the State summarized the proof it was prepared to present at trial:

Had this case gone to trial[,] the State's proof would have been that on February 20th, 2007 Detective Aaron Blevins with the Bristol[,] Tennessee Police Department received information that a juvenile female had been having sex with two adults located at 110 Basham Hill Road in Bristol Heights Mobile Home Park located in Bristol, Sullivan County, Tennessee. Two witnesses, Rosa Nevaras and Pam Kimble stated that they had seen a video tape of one of their friends, date of birth January 24th, 1992, I believe that made her age 14 at the time, engaging in sexual activity with a married couple in Bristol Heights Mobile Home Park. At some point the officer interviewed the defendants, Leslie De[M]ay and Frederick De[M]ay, who both admitted to having sexual intercourse with the minor victim in this case on or about . . . June 1st through 15th, 2006; June 15th through 30th, 2006; July 1st through 15th, 2006 and July 15th through 31st of 2006. The victim was also interviewed and admitted . . . that she also engaged in sexual intercourse with the couple over that period of time.

The officer did obtain a search warrant and obtained several video cassette tapes in the residence. Upon viewing those tapes did not find the sexual act in question but was told by the defendants that it had, in fact, been videotaped sometime between June through July of 2006. And both defendants acting in concert and being each being [sic] a party to the offense did promote, assist and permit the minor, date of birth January 24th, 1992, to participate in the performance of sexual acts involving the production of materials on a video which included the minor engaging in sexual activity with each other and also having sexual penetration, both individuals knowingly and intentionally having sexual penetration with the victim in this case and both defendants being at least four years older than the victim, all the above occurring in Sullivan County[,] Tennessee.

The trial court sentenced the defendant as a Range I, standard offender to ten years for the especially aggravated sexual exploitation of a minor conviction and to two years for each statutory rape conviction. The two-year sentences were ordered to be served concurrently but consecutively to the ten-year sentence, for a total effective sentence of twelve years. The court imposed a fine of \$3200.

The trial court then conducted a hearing to determine the manner of service of the defendant's sentences. Walter Shrum, the defendant's father, testified that he was willing to help the defendant find suitable housing and comply with the conditions of release imposed by the trial court. The trial court applied six enhancement factors: (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; (2) the defendant was a leader in the commission of an offense involving two or more criminal actors; (3) the victim of the offense was particularly vulnerable because of her age; (4) the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; (5) the defendant failed to comply with the conditions of a sentence involving release into the community; and (6) the defendant intentionally selected the victim in whole or in part

because of his belief or perception regarding the victim's gender. See Tenn. Code Ann. § 40-35-114(1), (2), (4), (7), (8), (17) (2006). The court found as mitigating factors that the defendant neither caused nor threatened serious bodily injury and voluntarily confessed to the offenses, according no weight to the former factor. See id. § 40-35-113(1), (13).

The trial court found that confinement was necessary to protect society by restraining a defendant who has a long history of criminal conduct and to avoid depreciating the seriousness of the offenses. See Tenn. Code Ann. § 40-35-103(1)(A), (B). The court stated, "I'm going to order [the defendant] to serve the ten year sentence as a Range I[,] standard offender in the Tennessee Department of Corrections and I'm going to place him on probation for six years on the two year statutory rape consecutive sentence."

## **ANALYSIS**

### **I. Sentencing**

The defendant argues that the trial court failed to properly consider the sentencing principles, enhancement and mitigating factors, and his potential for rehabilitation. As we understand, he asserts that the court improperly found that confinement was necessary to avoid depreciating the seriousness of the offense and misapplied enhancement factor (4), that the victim was particularly vulnerable because of her age. The State contends that the trial court properly sentenced the defendant. As we will explain, we agree with the State.

When an accused challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation

or treatment. Tenn. Code Ann. §§ 40-35-103, -210; State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169. In this case, the defendant has the burden of illustrating the sentence imposed by the trial court is erroneous. If our review reflects that the trial court, following the statutory sentencing procedure, imposed a lawful sentence, after having given due consideration and proper weight to the factors and principles set out under the sentencing law and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed upon the defendant is ten years or less. Tenn. Code Ann. § 40-35-303(a) (2006). Even if eligible, however, the defendant is not automatically entitled to probation as a matter of law. See id. § 40-35-303(b). The burden is on the defendant to show the denial of probation was improper. See State v. Summers, 159 S.W.3d 586, 599-600 (Tenn. Crim. App. 2004) (citing Ashby, 823 S.W.2d at 169); see also State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997) (stating that “[a] criminal defendant seeking full probation bears the burden on appeal of showing the sentence actually imposed is improper, and that full probation will be in both the best interest of the defendant and the public”).

There is no bright line rule for determining when a defendant should be granted probation. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Every sentencing decision necessarily requires a case-by-case analysis. Id. Factors to be considered include the circumstances surrounding the offense, the defendant’s criminal record, the defendant’s social history and present condition, the need for deterrence, and the best interest of the defendant and the public. State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997). Another appropriate factor for a trial court to consider in determining whether to grant probation is a defendant’s credibility or lack thereof, as this reflects on the defendant’s potential for rehabilitation. Id.

Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1) (2006).

### **A. Denial of Alternative Sentencing**

The trial court found that confinement was necessary to protect society by restraining a defendant who has a long history of criminal conduct and to avoid depreciating the seriousness of the offenses. The defendant asserts that the trial court did not make the findings required before making the latter determination and that this demonstrates the court failed to give due consideration and proper weight to the principles of sentencing. Therefore, he argues, the trial court's determinations should not be afforded the presumption of correctness outlined in Ashby.

We need not engage in a detailed analysis of this claim because even if we were to hold that the trial court erred in its determination that confinement was necessary to avoid depreciating the seriousness of the offenses, the defendant would not be entitled to relief. The trial court also found that confinement was necessary to protect society from a defendant with a long history of criminal conduct, and this finding is supported by the record. The defendant's presentence report reflects prior convictions for contributing to the delinquency of a minor, violation of a restraining order, and driving while license suspended. In a Sex Offender Risk Assessment report filed as an exhibit to the sentencing hearing, the defendant acknowledged engaging in sexual conduct as an adult with at least five other minors. The considerations listed in Tennessee Code Annotated section 40-35-103(1) are stated in the alternative; therefore, the presence of a single consideration is sufficient to justify a sentence involving confinement. See State v. Trotter, 201 S.W.3d 651, 654-55 (Tenn. 2006). This assignment is without merit.

### **B. Misapplication of Enhancement Factors**

While the court applied several enhancement factors in sentencing the defendant, he is contesting, as we understand his argument, application only of factor (4), that the victim of the offense was particularly vulnerable because of her age. Tenn. Code Ann. § 40-35-114(4) (2006). The State responds that the trial court properly applied this enhancement factor because it found that the defendant took advantage of the victim's lack of emotional maturity. In the alternative, the State argues that even if this factor was applied erroneously, the presence of the remaining enhancement factors renders the error harmless.

In evaluating the sentencing enhancement factors, the trial court stated:

And of course I find enhancing factor number one, you [the defendant] do have a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range in addition to the -- there are offenses that are set out starting on page 8 through page 10 [of the presentence report]. There are several prior convictions, none of them are felonies, but obviously there are two there that are of concern to me that I find very appropriate in this case. One is the contributing to the delinquency of a minor from 2002 involving Samantha Gilliam.

The other one is then the violation of the restraining order where there was a, you had a no contact order as a result of that conviction and then you were, ended up serving ten days in jail and I assume it was a contempt petition that was heard in that case. And again, you're -- you know, it would show to me that even if a judge tells you something, if it involves a woman and contact with that woman there's a good chance that you're not going to obey an order of the Court. That's certainly a consideration that I need to have.

The other thing, of course, and again, nobody really thinks that, well drinking alcohol under the age of 21 is a big deal, but on the other hand your record . . . clearly reflects that you consumed alcohol while you were under the age of 21 and that you failed to obey the law with regard to drinking and waiting until after you -- drinking alcohol until after you turned 21.

I also point out, too, that in 2001 you enlisted in the army and then after four months you were absent without leave, which is a crime under federal law. Now you may not have been prosecuted for it and obviously you ended up getting caught and you received something other than an honorable discharge as a result of that based on your report, but it still is criminal conduct.

Now, you know, [defense counsel] is correct in the sense that . . . you did give a report about your sexual activity in the Counseling and Consolation's report and you admitted to criminal acts when you and your wife were allegedly involved with a 13[-]year-old and you were 19, should would [sic] have been 17 at the time. Now in her statement she said that this person was 17 and you say she was 13. But regardless that's criminal conduct. . . . I mean, obviously the biggest concern that I have is the situation where you were using your situation as a supervisor to have sex with a minor, someone that was five years younger than you were, based again upon your self reporting. Also, you -- another minor that you said was 17. Was that a male or a female?

[THE DEFENDANT]: Female.

[THE COURT]: And then another person that you came in contact with as a result of your employment there that when you were 23 this person was 13, ten years younger than you are. . . .

. . . .

Anyway, so again -- I mean it's still criminal conduct that . . . I have to take into consideration. And, again, I mean the question that I have is, I mean not only just looking at this act itself but, you know, what kind of responsibility do I have to protect the public, the other 13[-]year-olds or the other 17[-]year-olds, or the 16[-]

year-olds that may be out there that you might have, you might for whatever reason have contact with. So I have to give that a great deal of weight.

I find enhancement factor number two, that you were a leader in the commission of an offense involving two or more criminal actors. Now [counsel for the State] argued earlier that both of you could perhaps be leaders in that and I mean I think that's entirely possible but no question that you were at least a leader in this offense, that you were the one -- I mean the most significant charge is the sexual exploitation, the filming, and it seems to me from everything that I've read, it was your idea. They may have agreed and went along with it but clearly you were the leader in the more serious of the charges that you pled guilty to. So I find that.

. . . .

The victim of the offense was particularly vulnerable because of age, I do find that. I mean while on one hand many people would say that 16[-]year-olds are sexually mature they certainly are not emotionally mature and you took advantage of that and so for purposes of this crime I find that she was particularly vulnerable because of her age, because of her lack of emotionally maturing.

Number seven, the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement. And, you know, I find that to be the case in this particular situation. As [counsel for the State] said, your sexual pleasures are not an issue in this particular case. As you said in your report you're addicted to sex, that you have a sex issue. So I find number seven as an enhancing factor as well.

You failed to comply with conditions of a sentence involving release in the community and I've already mentioned that, the juvenile delinquency, contributing to the juvenile -- delinquency of a minor, rather, and you violated terms and conditions of that out of Marshall County. And so, again, because of the nature of that violation I find that very significant in this kind of case.

. . . .

Number seventeen, the defendant intentionally selected the person against whom the crime was committed in a whole or in part because of the actor's belief or perception of the sex of that person, now that's a new one that just came in two years ago and of course there's not been a lot of court cases that are involved in that but, you know, I mean you could have statutory battery or you could have sexual exploitation of a minor without the sex being the issue, but I find that in this case the defendant made the decision to do it because this person was a woman. And while, as I say, I'm going to give that some weight I'm not going to give that a great deal of

weight but I still think that that is a factor that I can consider with regard to enhancing factors.

We conclude that the trial court misapplied enhancement factors (4), that the victim was “particularly vulnerable because of age or physical or mental disability,” and (17), that the defendant intentionally selected the victim based on his perception of her gender. Tenn. Code Ann. § 40-35-114(4), (17) (2006). Our supreme court explained in State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993), that “vulnerability enhancement relates more to the natural physical and mental limitations of the victim than merely to the victim’s age.” In the present matter, since enhancement factor (4) was applied solely on the basis of the victim’s age, without proof of any physical or mental limitations, its use was error. Factor (17) may not be used to enhance a sexual offense on the basis of gender selection alone. Tenn. Code Ann. § 40-35-114(17) (2006). However, the record supports the trial court’s finding of the remaining four enhancement factors, which are sufficient to justify the denial of alternative sentencing and the enhancement of the defendant’s sentences.

## **II. Correction of Judgments**

Although we affirm the defendant’s convictions and sentences, we must remand to the trial court for correction of the judgments in Counts 2-5. The sentencing hearing transcript reflects that the defendant was ordered to serve his ten-year sentence for especially aggravated sexual exploitation of a minor (Count 1) in the Department of Correction and to serve six years on probation for his two-year statutory rape sentences (Counts 2-5). The statutory rape sentences were ordered to be served concurrently with one another but consecutively to the sentence for especially aggravated sexual exploitation of a minor. The judgment in Count 2 reflects that the defendant was placed on probation for a period of *two* years. The judgments in Counts 3-5 reflect that the defendant was sentenced to two years in the Department of Correction, with no mention of probation. Accordingly, we remand for entry of corrected judgments in Counts 2-5 to reflect that the defendant was sentenced to six years probation to be served consecutively to Count 1. The court is instructed to specify in the judgments that the six-year probationary period is to begin after the defendant finishes serving his ten-year sentence in Count 1.

## **CONCLUSION**

Based on the foregoing authorities and reasoning, the judgments of the trial court are affirmed and the cause is remanded for entry of corrected judgments in Counts 2-5 as set out herein.

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ALAN E. GLENN, JUDGE